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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

BROWN UNIVERSITY et al.,
Petitioners,
vs.
AMY COHEN et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the First Circuit
Case No. 95-2205

BRIEF OF THE STATE OF COLORADO AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF AMICUS CURIAE

The State of Colorado[1] believes that the ruling and rationale below requires State-supported schools and universities to violate the Fourteenth Amendment to the United States Constitution in order to comply with 20 U.S.C. § 1681 ("Title IX"). As detailed below, a divided panel of the United States Court of Appeals for the First Circuit has announced an interpretation of Title IX that requires that one gender be given preferential treatment and

[1] This brief is also joined by the State System of Higher Education of Pennsylvania.

imposes a quota concerning representation. Such an interpretation is contrary to the Fourteenth Amendment.

Amicus curiae submit this brief to focus attention on the contradiction between the mandate of the Fourteenth Amendment and the analysis of the First Circuit and to illuminate the negative consequences for state-supported institutions of higher education and school districts.

REASONS FOR GRANTING THE WRIT

Colorado, like every State in the Union, has established and operates public schools and universities.[2] Many of these educational entities participate in intercollegiate or interscholastic athletics and virtually all receive federal funds in some form. Thus, like Brown University, they are required to comply with Title IX as it applies to intercollegiate and interscholastic athletics.

This means that, under the First Circuit's analysis, an institution must do one of three things to comply with Title IX. First, each gender's representation in varsity athletics[3] must be substantially proportionate to its representation in the student body.[4] In short, if one gender is fifty percent of the student body, its representation among varsity athletes must approximate fifty percent.[5] Second, an institution may demonstrate that it has a continuing history of expanding opportunities for the underrepresented gender.[6] Presumably, this periodic expansion must continue until such

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[2] The State System of Higher Education of Pennsylvania consists of fourteen state-owned institutions of higher education.

[3] The First Circuit's emphasis on varsity athletics, rather than club and intramural sports, means that the judicial inquiry is limited to an elite. Only four percent of college students participate in varsity athletics. *Athletes Are Small Group With Impact* (*USA Today*), March 3, 1997 at 4C. Limiting the inquiry to such a small elite is unusual This Court would never limit its inquiry into whether a school district was unitary by focusing exclusively on the composition of gifted and talented classes. Similarly, compliance with Title IX should not turn on the gender representation of only the elite.

[4] It is unclear exactly what constitutes substantial proportionality. This ambiguity must be resolved so that institutions have clear guidance.

[5] If substantial proportionality is defined as each gender having a representation in athletics which is within five percentage points of the gender's representation in the student body, then only nine of 108 NCAA Division I-A schools met this criteria with respect to representation for women. However, of those nine, three (the U.S. Air Force Academy, the U.S. Military Academy, and the U.S. Naval Academy) do not meet this criteria with respect to representation for men. Thus, only six of 108 NCAA Division I-A institutions meet the criteria for both men and women. *Passing the Test* (*USA Today*), March 3, 1997 at 4C. At the Division I-AA level, only seven of 117 institutions meet this criteria. *Passing the Test* (*USA Today*), March 4, 1997 at 6C. If only eleven of the 225 institutions in NCAA Divisions I-A and I-AA have met the criteria, then one must question the viability of this criteria for measuring compliance with Title IX.

[6] As a practical matter, this means that teams have been added in the last three years. *How to Comply with Law* (*USA Today*), March 3, 1997 at 4C ("The [Office for Civil Rights of the United States Department of Education] has considered actions taken in the last three years as signs of continuing expansion").

time as substantial proportionality is reached.[7] Third, an institution may demonstrate that it is currently meeting all interests and abilities of the underrepresented gender. Presumably, this means that the institution must periodically survey the underrepresented gender and add a new team every time there is an indication of an unmet interest and ability until substantial proportionality is achieved.[8]

Although public schools and universities must comply with this mandate, they must also comply with the constraints of the Fourteenth Amendment.[9] Yet, Title IX, as interpreted by the court below, is contradictory to the Fourteenth Amendment. Quite simply, a public institution

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[7] In effect, the First Circuit's interpretation allows institutions which are "continually expanding" opportunities for the underrepresented gender to escape Title IX liability under the second part of the test. Thus, an institution which added numerous teams for the underrepresented gender during the 1970's and 1980's, but has not added teams recently will be found in violation. In contrast, a second institution which did nothing in the 1970's and 1980's escapes liability by making minimal additions for the underrepresented gender. This is true even though the second institution may have a far greater gap between the genders. The second institution can continue to avoid liability by making the token effort of adding another team in a few years. In effect, the institutions that practiced resistance are deemed in compliance while those that made early efforts to expand opportunities in good faith are punished.

[8] Because students are constantly entering and leaving the institution, survey data quickly becomes useless. Thus, if an institution is going to demonstrate that it is filling all needs and thereby meets prong three, it must do surveys on a constant basis.

[9] Of course, similar constraints may be imposed by state or local law. The only constraint imposed by federal law is the requirements of Title IX.

cannot adhere to the First Circuit's interpretation of Title IX and also adhere to the Fourteenth Amendment.

I. THE FIRST CIRCUIT'S INTERPRETATION REQUIRES PREFERENTIAL TREATMENT ON THE BASIS OF GENDER IN VIOLATION OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment is "essentially a direction that all persons similarly situated . . . be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Consequently, differing treatment on the basis of gender will rarely be upheld. *See United States v. Virginia*, 116 S. Ct. 2264 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Orr v. Orr*, 440 U.S. 268 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976). Indeed, after *Virginia*, gender classifications will be upheld only if: (1) there is an exceedingly persuasive justification for the gender classification; and (2) the gender classification is substantially related to an important government objective. *Virginia*, 116 S.Ct. at 2275. *See also id.* at 2291 (Scalia, J., dissenting) (*Virginia* "drastically revises our established standard for reviewing sex-based classifications"). This is true regardless of the gender which is favored by the classification. *Hogan*, 458 U.S. at 730 ("That this statute discriminates against males does not exempt it from scrutiny or reduce the standard of review").[10]

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[10] Indeed, this Court has emphatically rejected the notion that "benign" discrimination is subjected to a lesser standard. *Adarand*, 115 S.Ct. at 2113 (citations omitted). *See also Croson*, 488 U.S. at 495; *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). *Cf. Adarand*, 115 S. Ct. at 2118-19 (Scalia, J., concurring) (no recognition of a debtor or creditor race); *Id.* at 2119 (Thomas, J., concurring) (no racial paternalism exception).

Yet, under the First Circuit's reasoning, public schools and universities are required to give preferential treatment on the basis of gender.[11] Members of the underrepresented gender have certain entitlements and members of the overrepresented gender face discrimination.

To illustrate, in 1992, Colorado State University decided to discontinue its men's baseball program with 55 participants and its women's softball program with 18 participants. Since both genders lost a program and since three times as many men's positions were cut, there was no discrimination against women in violation of the Fourteenth Amendment. Indeed, because more men's positions were cut, the decision actually narrowed the gap in representation between the genders and moved the University closer to substantial proportionality. Yet, the U.S. Court of Appeals for the Tenth Circuit found that the decision to eliminate softball violated Title IX and ordered the women's program

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[11] Moreover, the lower court's interpretation assumes that a person's rights depend upon his/her membership in a particular group. This assumption is completely at odds with this Court's observation that "the Fifth and Fourteenth Amendments to the Constitution protect **persons**, not **groups**." *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2112 (1995) (emphasis in original). *See also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1986) (plurality opinion). *Cf. Missouri v. Jenkins*, 115 S. Ct. 2038, 2065 (1995) (Thomas, J., concurring). (The Fourteenth Amendment demand that children must be regarded "as individuals, not simply as members of racial, ethnic, or religious groups"); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 172 (1977) (Brennan, J., concurring) ("an explicit policy of assignment by race may serve to stimulate our society's latent race-consciousness"); *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting) ("Here the individual is important, not his race, his creed, or his color.").

reinstated. *See Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 829-32 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

The message of *Roberts* and the First Circuit's decision is clear. If an institution wishes to satisfy the first part of the test, substantial proportionality between the genders, it may eliminate positions for the overrepresented gender with impunity. However, the institution dare not eliminate positions for the underrepresented gender. *See Kelly v. Board of Trustees of the Univ. of Illinois*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 938 (1995) (No Title IX violation when team from the overrepresented gender was eliminated in order to improve the representation of the underrepresented gender). Consequently, institutions achieve compliance not by expanding opportunities for the underrepresented gender, but by cutting opportunities for the overrepresented gender.[12]

Similarly, if an institution is pursuing compliance through the second option, continuous expansion, it will be adding teams for the underrepresented gender while freezing or even cutting teams for the overrepresented gender. Moreover, if an institution is pursuing compliance through the third option, meeting every need of the underrepresented gender, it will be creating new opportunities for the underrepresented gender whenever there is interest and ability in a particular sport and ignoring the unmet interests and abilities of the overrepresented gender. In effect, the

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[12] Indeed, since 1992, universities have discontinued ten men's swimming teams, eight men's tennis teams, and seven men's gymnastics programs. After 1996-97, Syracuse University will drop men's wrestling and men's gymnastics and Michigan State University will drop men's lacrosse and fencing. *Scorecard: Spare the Axe* (*Sports Illustrated*), February 24, 1997 at 22, 25.

First Circuit's interpretation gives a preference to the underrepresented gender and mandates discrimination against the overrepresented gender. Such a result is incompatible with a Constitution which does not tolerate classes among its citizens. *See Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559-60 (1896) (Harlan, J., dissenting)).

More importantly, the First Circuit's mandate for gender discrimination is not supported by an "exceedingly persuasive justification." *Virginia*, 116 S. Ct. at 2275. Although this Court has not had the opportunity to precisely define what constitutes an exceedingly persuasive justification in the context of gender classifications, the definition would appear to be similar to the concept of a compelling state interest in the context of a racial classification. Thus, the cases interpreting compelling interest can be useful guides.

In deciding what is a compelling interest, this Court has rejected the desire to have greater representation from specific groups, *Board of Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., announcing the judgment of the Court), the elimination of societal discrimination, *id.* at 307-09, the need for diverse role models, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion), and compliance with the demands of the federal government. *Miller v. Johnson*, 115 S. Ct. 2475, 2490-91 (1995). Indeed, the only interest which has been found to be compelling is the need to remedy the present day effects of specific incidents of prior discrimination. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496-97 (1989). *See also Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547, 612 (1990) (O'Connor, J., joined by Rehnquist,

C.J., Scalia, and Kennedy, JJ., dissenting) ("modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination.").

Thus, is an "exceedingly persuasive justification" is somewhat analogous to a compelling interest, the proposed justifications of increasing the representation of one gender, eliminating societal discrimination against one gender, creating role models of a particular gender, and complying with the wishes of federal agencies would be insufficient to justify the discrimination against the overrepresented gender. Indeed, the only certain definition of exceedingly persuasive justification is remedying the present day effects of past intentional discrimination against the underrepresented gender.[13] In sum, the gender discrimination mandated by the First Circuit's interpretation of Title IX cannot be reconciled with the requirements of the Fourteenth Amendment.

Even if the concept of exceedingly persuasive justification were not deemed to be closely analogous to the concept of compelling interest in the context of racial discrimination, the First Circuit's interpretation still raises grave Fourteenth Amendment concerns. In other contexts, this Court has placed substantial limitations on anti-

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[13] These findings must be highly specific. Although the findings of legislative bodies are generally entitled to great deference, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955), a classification cannot rest on some generalized assertion that discrimination exists in society or in a particular agency or institution. *Croson*, 488 U.S. at 500-01; *McLaughlin v. Florida*, 379 U.S. 184, 190-92 (1964). These findings of previous intentional discrimination have to be highly specific. *Croson*, 488 U.S. at 510-511 (quoting *Fullilove v. Klutznik*, 448 U.S. 448, 539 (1982) (Stevens, J., dissenting)).

discrimination plans. *See Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987) (stating that in an equalization plan, no persons may be excluded automatically based solely on gender); *Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (cautioning against any equalization plan which, as a matter of course, replaces workers of one race with those of another). Given these pronouncements, an interpretation which sanctions discrimination on the basis of gender as a means of benefiting the other gender must be regarded with suspicion.

II. THE FIRST CIRCUIT'S INTERPRETATION IMPOSES A QUOTA IN VIOLATION OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment does not mandate a specific level of representation for a particular group, *see Freeman v. Pitts*, 503 U.S. 467, 493-94 (1992) (no duty to correct racial imbalances caused by housing patterns); *Milliken v. Bradley*, 418 U.S. 717, 740-41 (1974) (no constitutional right to a specific racial balance in schools), and prohibits governmental attempts to artificially achieve specific levels of representation. *Bakke*, 438 U.S. at 316-18 (Powell, J., announcing the judgment of the Court). In fact, the underlying rationale for having quotas, that a certain group's representation in a particular profession or activity should correspond to its representation in a given population, "rests on the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Croson*, 488 U.S. at 507 (quoting *Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)). In sum, as long as such underrepresentation is the product of private choices, it is

perfectly permissible for certain groups to be underrepresented. *Freeman*, 503 U.S. at 493-94.[14]

However, under the lower court's reasoning, a specific level of representation is arbitrarily mandated and artificially achieved. A gender's representation among varsity athletes must correspond to its representation in the student body. If an institution has not achieved substantial proportionality between the genders, it has four options: (1) add teams for the underrepresented gender periodically until such time as substantial proportionality is achieved; (2) cutting opportunities for the overrepresented gender immediately so that substantial proportionality is achieved; (3) add a team every time there is an indication of an unmet interest and ability among the underrepresented gender until substantial proportionality is achieved; or (4) some combination of the first three options. All four options eventually will result in an athletic program where each gender's representation mirrors its representation in the student body. The question is not **whether** the quota will be reached but **when**. Such a result is inconsistent with a constitutional scheme that does not mandate or assume a particular level of representation for a given group.

Moreover, in mandating this specific level of representation, the lower court assumed that each gender's

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[14] Moreover the mere fact that certain groups are underrepresented is not, by itself, sufficient to establish intentional discrimination in violation of the Constitution. *Washington v. Davis*, 426 U.S. 229, 250-52 (1976); *Mayor of Philadelphia v. Educational Equity League*, 415 U.S. 605, 620 (1974). *See also* 3 Ronald R. Rotunda & John E. Nowak, *Treatise on Constitutional Law*, §18.4 (2d ed. 1992) ("statistical proof of differing impact among racial groups would not be sufficient to establish a racial classification absent some other proof . . .").

interest exists in lockstep proportion to its representation in the university student body.[15] Such an assumption is entirely unrealistic. *Croson*, 488 U.S. at 507. Indeed, the evidence from high schools is to the contrary. Although young women comprise more than fifty percent of all high school students, they constitute less than forty percent of high school athletes.[16] Furthermore, Title IX is in no way limited to athletic programs. In fact, the legislative history scarcely even mentions intercollegiate or interschool athletics, *see* 118 Cong. Rec. 5,807 (1972); 117 Cong. Rec. 30,407 (1971), focusing instead on the wide variety of programs and course offerings throughout secondary and post-secondary education. Consequently, there is no reason why the First Circuit's reasoning would not be equally applicable to the composition of a particular institution, a particular program, or even a particular course. Indeed, application of a different test for some or all of these areas would substantially contradict the single dictate of the statute

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[15] As in *Mayor of Philadelphia*, "the simplistic percentage comparisons undertaken by the Court of Appeals lack real meaning" in determining whether discriminatory exclusion has occurred here. 415 U.S. at 620.

[16] In determining whether a particular gender is underrepresented in intercollegiate athletics, it is imperative to use the appropriate statistical pool. "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than the smaller group of individuals who possess the necessary qualifications) may have little probative value. *Croson*, 488 U.S. at 501 (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977)) (parenthetical original in *Croson*). "[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating exclusion must be the number of minorities qualified to undertake the particular task. *Croson*, 488 U.S. at 501-02.

which prohibits discrimination in "any education program or activity". 20 U.S.C. § 1681(a) (emphasis added).

Thus, since young women constitute fifty percent of the population, they should have fifty percent of the slots at the service academies.[17] Similarly, since young men constitute fifty percent of the population, they should have fifty percent of the slots in nursing, elementary education, or occupational therapy programs. The possibilities that, for whatever reason, young men are more interested in attending the service academies or that young women are more likely to enter certain fields is irrelevant. *But cf. Equal Employment Opportunity Comm'n v. Sears, Roebuck & Co.*, 839 F.2d 302, 320-21 (7th Cir. 1988) (describing evidence supporting conclusion that, men tend to prefer commission sales positions more than women do). The only thing that matters under the lower court's interpretation of Title IX is that "substantial proportionality" among the genders is achieved. A test with such broad and crucial ramifications warrants the review and consideration of this Court. *Cf. Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977) (certiorari granted "to consider a substantial question affecting the enforcement of a pervasive federal law").

III. TITLE IX SHOULD BE INTERPRETED AS BEING COEXTENSIVE WITH THE FOURTEENTH AMENDMENT.

Although the First Circuit's interpretation of Title IX is contrary to the Fourteenth Amendment, the proper

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[17] At present, young women constitute fifteen percent of the enrollment at the U.S.-Air Force Academy, fourteen percent at the U.S. Naval Academy, and twelve percent at the U.S. Military Academy. *Passing the Test* (*USA Today*), March 3, 1997 at 4C.

interpretation is that Title IX is coextensive with the Fourteenth Amendment. Title VI, 42 U.S.C. § 2000d, which prohibits racial discrimination in education, was the model for Title IX. *Grove City College v. Bell*, 465 U.S. 555, 566 (1984).[18] Title VI is coextensive with the Fourteenth Amendment's prohibitions on racial classifications. *Guardian Ass'n v. Civil Service Comm'n of the City of New York*, 463 U.S. 582, 589-90 (1983) (White, J., announcing the judgment of the Court) ("Title VI on its own reaches no further than the Constitution . . ."); *id.* at 639-41 (Stevens, J., dissenting); *Bakke*, 438 U.S. at 287 (Powell, J., announcing the judgment of the Court) ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment"); *id.* at 328 (Brennan, J., joined by White, Marshall, & Blackmun, JJ.) ("Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment").[19] Since Title IX was modeled on Title VI

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[18] *See also* Sex Discrimination Regulations: Hearings Before the House Subcommittee on Post Secondary Education of the Committee on Education and Labor, 94th Cong., 1st Sess. 16, 150 (1971) ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI") (comments of Senator Bayh).

[19] *See also* Non-Discrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8755, 8758-59 ("The Supreme Court has made clear that Title VI prohibits intentional classifications based on race or national origin to the same extent and under the same standards as the Equal Protection Clause of the Fourteenth Amendment"); William A. Kaplin & Barbara A. Lee, *The Law of Higher Education*, 802 (3d ed. 1995) ("Courts have generally held that Title VI incorporates the same standards for identifying unlawful discrimination as have

and since Title VI is coextensive with the Fourteenth Amendment, then Title IX also should be coextensive with the Fourteenth Amendment. In effect, Title IX, like Title VI, should extend the protections of the Fourteenth Amendment to private educational entities.[20]

Under this interpretation of Title IX, if an educational institution chose to sponsor competitive athletics, it would have to treat both genders alike in terms of scholarships, opportunity for competition, equipment, facilities, number of coaches, quality of coaches, travel arrangements, etc. All basketball players would be treated alike regardless of whether they were on the men's team or the women's team. In terms of determining what teams were sponsored for each gender, the institution would have accommodate the interests and abilities of both genders *to the same extent*. Thus, if one gender had interest and ability in ten sports and the other had interest and ability in eight sports and if the institution chose to accommodate every interest and ability, one gender would have ten sports and the other would have eight. The institution would not be forced to assume that both genders had equal desires to participate.

Similarly, if an institution had to cut teams, it would have to do so in a gender neutral fashion. If an institution which was accommodating all of the interests and abilities for both genders were to decide that it could only

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been developed under the Fourteenth Amendment's Equal Protection Clause").

[20] Although Title VI and Title IX are applicable to public institutions which receive federal funds, those institutions are already bound by the Fourteenth Amendment. Thus, the application of these statutes (as opposed to implementing regulations) has no practical effect on public institutions.

accommodate one-half of the expressed interests and abilities, then it would have to cut half of the teams for both genders. Conversely, if an institution which was accommodating half of the interests and abilities decided to accommodate all of the interest and abilities, it would have to add teams for both genders. Title IX, like the Constitution, would no longer tolerate classes among its citizens. *Romer*, 116 S.Ct. at 1623.

CONCLUSION

At the end of the day, our Constitution recognizes only one race, one gender, one class -- the American People. It does not tolerate differing treatment on the basis of gender and it does not tolerate the imposition of quotas concerning a gender's representation. This case presents this Court with an ideal opportunity to reinterpret Title IX so that it is consistent with the Fourteenth Amendment.

For the reasons set forth above, Colorado urges this Court to grant the Petition and issue Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted this 20th day of March, 1997.

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REPLY BRIEF

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No. 96-1321

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BROWN UNIVERSITY, *et al.*,
Petitioners,
v.
AMY COHEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

From the outset of this litigation, respondents have contended that a violation of Title IX can be based upon a statistical disparity between the gender composition of a university's athletic program and its student body without proof that male and female students share an equal interest in varsity participation, even if this interpretation effectively requires universities to afford varsity opportunities to qualified women in preference to similarly situated men. Having staked their entire case on these issues at every turn in the lower courts, respondents now assert that they are not properly before this Court. *See, e.g.*, Brief in Opposition ("Opp.") at 14-17. Respondents' efforts to evade review are meritless. The First Circuit never made any finding that Brown would be liable for discrimination if Title IX requires proof of intentional discrimination, or if it requires proof of a disparate impact to be based upon a comparison with the pool of qualified athletes seeking varsity opportunities.[1] There accordingly would not be anything "advisory" about an opinion reversing the only theory relied upon by the First Circuit to impose liability on Brown. Opp. at 14. As the briefs of the amici persuasively illustrate, this case presents issues of exceptional importance that warrant review.

A. This Case Squarely Presents the Questions Raised in the Petition

1. There is no merit to respondents' claim that the district court found Brown liable on an "independent ground," or that any such finding would bar review here. Opp. at 16-17. Respondents concede that "the First Circuit did not address" the allegedly "independent ground" (Opp. at 11 n.10, 17), and this Court routinely grants

[1] Both issues are included in Question 1 of the Petition ("Pet."), which challenges the First Circuit's interpretation of a Title IX plaintiff's prima facie case. Contrary to respondents' assertion (Opp. at 4 n.4), Brown contends that a violation cannot be predicated solely on proof of a numerical disparity in the selection of teams. *See* Pet. at 4; 34 C.F.R. § 106.41(c)(2)-(10).

certiorari to review grounds relied upon by the courts of appeals even though there may be some other basis for reinstatement of the judgment on remand.[2] In addition, the "independent ground" relied upon by respondents to bar review here could not in fact support a finding of liability if the First Circuit's analysis of Title IX is reversed. The district court's alternate ground rested on one finding: "far more male athletes are being supported at the university-funded varsity level than are female athletes." Cohen III at 144a. But there is no dispute that the percentage of varsity positions funded by the university was actually higher for women than men. *Id.* at 96a-97a; 158a. It is apparent, therefore, that this finding rests on nothing more than the numerical difference between men and women athletes at Brown, and the relevance of that difference to proof of a Title IX violation is squarely presented by this petition. Pet. at (i).

2. Contrary to respondents' assertion, the district court never made any finding that Brown selected sports "without regard to [men's and women's] interests and abilities." Opp. at 14.[3] Nor did the district court find that Brown

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[2] *See, e.g., Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 580 (1978) (reversing finding of liability under Title VII because the court's analysis of the prima facie case was incorrect, and declining to reach "alternative theories of liability [that were not] directly addressed" by the Court of Appeals); *Wards Cove v. Atonio*, 490 U.S. 642, 655 (1989) (reversing finding of liability based upon an improper statistical analysis without resolving "whether the record made in the District Court will support a conclusion that a prima facie case . . . has been established on some [other] basis"). The case cited by respondents, *United States v. Hastings*, 296 U.S. 188, 193-94 (1935), involved a direct criminal appeal from the District Court pursuant to a limited statutory grant of appellate jurisdiction, and is completely inapposite.

[3] Respondents' sole support for this assertion is the district court's finding that Brown's selection of sports and recruitment "predetermines" the gender balance of its program, but the district court did not find that 'predetermin[ation]' was improper or that it reflected disregard for the relative interests of men and women. It instead found this fact relevant to its interpretation of the term "*substantially* proportionate." Cohen III at 118a-20a (em-

purposefully sought to disadvantage women. Cohen III 85a-147a.[4] The district court in fact observed that Brown made its decisions to withdraw funding for both men's and women's teams "in an effort to comply with its understanding of Title IX's directives." Cohen III at 86a. *See also, id.* at 140a (noting that Brown has "improved the quality of its women's program[s]" after the initial expansion in the 1970s); Cohen II at 169a (Brown "promptly" added "fourteen women's varsity teams" when it became coeducational). The issue in this case is accordingly not whether Brown intended to treat men and women fairly under Title IX, as that must be presumed on this record, but whether its "understanding of Title IX's directives" was correct.

3. It also must be presumed for the purpose of resolving the legal issues presented in the petition that there are substantially more men than women in the group of qualified athletes seeking to compete in varsity athletics at Brown because the First Circuit did not reject this contention "based on the evidence introduced at trial." Opp. at 9 (emphasis deleted). The Court stated unequivocally that statistical evidence "assessing the level of [each gender's] interest in sports" was "completely irrelevant" to proof of Brown's liability under Title IX because such evidence "cannot justify providing fewer athletics opportunities for women than for men" even if "it can be

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phasis added). The lower courts and the plaintiffs in fact share the view that it is just fine for Brown to "predetermine" the gender ratio of its program as long as that ratio mirrors the student body ratio.

[4] Respondents' statement (Opp. at 1) that Brown "knew 'full well' that the women's teams (unlike the men's teams) would be unable to continue" when it withdrew funding for four teams in 1992 is not supported by their sole citation to a sentence in the district court's preliminary injunction opinion. The sentence did not say that Brown knew that the men's teams, but not women's teams, could continue without university funding (Cohen I at 232a); was not adopted in the liability phase (Cohen III at 99a); and is irrelevant to the theory of liability adopted by the court. *See, e.g.*, Cohen III at 86a & n.2, 138a-145a.

empirically demonstrated that, at a particular time, women have less interest in sports than do men." Cohen IV at 41a-42a. *See also*, Cohen II at 184a & n.16, 187a (acknowledging that "it might well be that more men than women at Brown are currently interested in sports" but rejecting the relevance of that fact to liability under Title IX).

The district court's observations about Brown's evidence on this issue accordingly do not bar review of the theory relied upon by the First Circuit. *See* n.2, *supra*. The district court did not, in any event, make any factual finding that liability could be imposed based upon an analysis of the qualified pool. First, respondents' assertion (Opp. at 10 n.9) that Brown's claim was "unproven" is beside the point, because the plaintiff bears the burden of proving the gender composition of the qualified applicant pool (Cohen II at 186a; Cohen III at 136a), and none of plaintiffs' three experts witnesses ever testified that a relatively equal number of qualified men and women seek to participate in varsity athletics, nor have plaintiffs so contended. Second, the district court did not make factual findings on this issue. The court simply cited the "theoretical and practical problems" associated with a qualified pool analysis as an additional reason to "confirm[] [its] initial conclusion" that "defendant's interpretation of [Title IX] is incorrect." *Id.* at 128a; 130a; 126a-30a; 134a-36a.

Nor did the First Circuit adopt the district court's suggestion that proof of a qualified pool "may be insurmountable" (Cohen III at 130a) if required by Section 1681.[5] The Court instead found "no error in the district court's refusal to apply Title VII standards" based on the con-

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[5] The First Circuit in fact acknowledged that survey evidence of athletic interests could be relevant to determining whether there were any "unmet interests" of women athletes, but found such evidence was not relevant to that issue here because "unmet interest" had been established through proof that there were women's teams actively competing that were not being funded by the university. Cohen IV at 41a-43a, & n.15.

clusion in Cohen II that the "Title VII concept of the 'qualified pool' has no place in a Title IX analysis of equal opportunities" as a matter of law because "the controlling statutes and regulations are clear." Cohen IV at 39a, 37a. The First Circuit accordingly did "refuse[] to consider" Brown's evidence in determining whether Brown had violated Section 1681, and did not "reject[] Brown's 'relative interest' argument as 'unproven'." Opp. at 10 n.9.[6]

4. Contrary to respondents' assertions (Opp. at 12, 15-16, 23-25, 26), the petition provides an ideal opportunity to decide whether the interpretation of Title IX at issue effectively requires universities to afford preferential treatment to women in contravention of 20 U.S.C. § 1681(b) and the Equal Protection Guarantee. First, respondents mistakenly contend that the First Circuit "affirmed the district court's finding, as a factual matter, that Brown failed to prove that the 'full and effective accommodation of the interests and abilities of Brown's female students would disadvantage Brown's male students.'" Opp. at 12. The lower courts' opinions leave no doubt that their view of compliance does "disadvantage Brown's male students" and leads to preferential

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[6] The First Circuit stated only that the *cause* of women's relative lack of interest was "unproven." Cohen IV at 39a. Statistical evidence of the gender composition of the group of qualified applicants is required in a discrimination case, however, without regard to the fact that an imbalance in that pool may have been caused by an historic lack of opportunities in the field. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989) (holding that the disparity between the percentage of city contracts awarded to minority businesses and the number of minorities in the population did not support a finding of discrimination even though "there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs"); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309, 311 (1977) (defendant not responsible for statistical disparities caused by pre-Act discrimination and qualified pool should exclude minorities who would not be in the pool but for prior affirmative action in the relevant market.)

treatment.[7] Under the First Circuit's view, Brown could achieve compliance by funding all viable women's teams without funding all viable men's teams (Cohen IV at 59a), or by eliminating positions for approximately 213 qualified men while providing funded positions for all but 40 of the qualified women. *Id.* at 58a-59a. This means that Brown could comply with Title IX by fully accommodating 89% of the qualified female athletes while accommodating less than 62% of the qualified male athletes. Cohen III at 96a-97a, 163a. *See also*, Cohen II at 184a & n.16 (using a hypothetical to explain that a university that has not achieved gender parity could comply with Title IX by offering opportunities to 100% of the interested women and only 50% of the interested men because a "university can provide as many (or as few) additional slots for men as it sees fit").

Second, the questions in the petition are not predicated on the view that the First Circuit's test permits a finding of liability based solely on evidence that a university has failed to achieve immediate compliance with a numerical quota. Opp. at 15, 23. The petition acknowledges that the First Circuit permits three ways to establish Title IX compliance. *See, e.g.*, Pet. at 15.[8] But respondents fail to come to terms with the fact that where men and women are not equally represented in the qualified pool, all three paths to compliance effectively require some type of preference, ranging from a strict numerical quota (part one), to a set aside for qualified women in numbers calculated to correspond either to the total number of women quali-

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[7] The statement cited by respondents simply said that "[t]he district court did not find" that male students would be disadvantaged by the accommodation of all the women (Cohen IV at 8a) (emphasis deleted) but that is because the district court declined to make any factual findings on the issue of relative interests. *See also* Cohen III at 163a.

[8] As the first question in the petition reflects, however, the First Circuit held that "a Title IX plaintiff makes out an athletic discrimination case by proving numerical disparity, coupled with unmet interest," and the defendant bears the burden of establishing uninterrupted program expansion. Cohen II at 190a.

fied to compete on viable teams (part three) or ever-increasing numbers (part two), up to the student body ratio. Pet. at 7-9, 20-22. In addition, the lower court opinions unequivocally confirm that parts two and three of the policy interpretation can only be used as a way station on the road to "gender parity." *See, e.g.*, Cohen II at 183a (institutions must increase the numbers "until the opportunities . . . are equivalent by gender.")[9]

Third, respondents contend that the question whether the Court's interpretation of the standards governing liability under Title IX is consistent with the Equal Protection Guarantee is not properly presented because the Court based its interpretation of Title IX on the need to redress an "adjudicated determination" of discrimination by Brown and not "societal discrimination" against women. Opp. at 16. That assertion ignores the clear holding of the First Circuit in Cohen II that any "gender classification slanted somewhat in favor of women" that might arise out of its interpretation of Title IX is constitutional because "Congress has broad powers under the Fifth Amendment to remedy past discrimination." App. at 187a. This analysis was expressly reaffirmed in Cohen IV at 48a,[10] and there is no legal or prudential bar to this Court's review of that issue.[11]

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[9] Brown's petition accordingly accurately asserts that it would have to "set aside *up to* 51%" of its varsity program for qualified women under the Court's interpretation (Pet. at 2) (emphasis added), and that these standards "effectively require" (*see infra* at 10) universities to afford preferences "in an effort" to achieve gender balance. *Id.* at (i). *See Opp.* at 15 & n.14.

[10] Although Cohen IV independently reviewed the constitutionality of the district court's remedial order (App. at 48a, 51a), a court's power to order a gender-conscious remedy based upon proof that the *defendant* engaged in discrimination presents a distinct issue that is not in dispute here. *See*, Pet. at 14 n.10.

[11] Brown did not waive this issue (Opp. at 13 n.13), which was raised and decided twice, and has standing, because it has been held liable under Title IX, and has a right to argue that the statute should be interpreted consistent with the Constitution under settled rules of statutory construction. *See* Pet. at 24.

B. The First Circuit Has Decided Federal Questions of Exceptional Importance in a Manner That Conflicts With This Court's Precedents

1. On the merits, respondents say precious little. Respondents do not dispute the fact that Section 1681(b) was patterned after Title VII, that under such circumstances this Court has accorded its Title VII decisions precedential weight, and that the First Circuit did not adhere to the disparate impact analysis required by this Court in *Wards Cove* and other Title VII decisions. Opp. at 19-22. Respondents instead contend that these Title VII precedents cannot be applicable to Title IX because they only concern the use of statistics "to show that the denial of jobs" to women and minorities "is not random, but rather is the result of purposeful discrimination"—an inquiry they say is not relevant here because "the percentage of women participating in athletics is never the result of chance . . . [but] the deliberate result of the number and size of women's and men's teams that the university chooses to sponsor." Opp. at 20.

The disparate impact analysis under Title VII, however, is in fact designed to prohibit allocation of opportunities through use of a "selection mechanism," *Wards Cove,* 490 U.S. at 653, that has an unwarranted "disparate impact" on one race or gender without regard to intent. *Id.* at 644, 684 n.4. There is no "disparate impact," however, when the defendant has awarded opportunities to women in proportion to their numbers in the qualified applicant pool. *See, e.g., Wards Cove*, 490 U.S. at 650; *Hazelwood,* 433 U.S. at 309. In addition, respondents do not even attempt to explain why it is "discriminatory" for Brown to use an athletic selection practice that produces the same gender ratio as a completely "random" process, but not discriminatory to use a gender-driven selection practice that dramatically skews the ratio in favor of women.[12]

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[12] Respondents do not challenge Brown's assertion that a purely random assignment of positions to all qualified athletes seeking

Respondents also claim that this Court's precedents disavowing standards that effectively require preferential treatment are inapplicable because the standard at issue does not "mandate[] statistical balancing." Opp. at 23 (emphasis deleted). That of course is not the *sine qua non* of "preferential treatment." *See, e.g., Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981) (evidence that an employer had selected a male when a qualified female had applied for the position could not establish liability because "it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally," and this theory would give rise to "preferential" treatment); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978) (set aside for up to 16 qualified minority applicants constituted preferential treatment barred by Title VI and the Equal Protection Clause).

Respondents' equal protection analysis similarly ignores the First Circuit's concession that there is "scant legislative history regarding Title IX as it applies to athletics" (Cohen IV at 46a), and fails to acknowledge that preferences adopted to remedy societal discrimination—as distinct from a prohibition of discriminatory practices that deny equal opportunity—cannot be sustained if the principal beneficiaries are women who have not been actual victims of discrimination. *See* Pet. at 25-26.[13]

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varsity participation would not produce a 50/50 gender ratio if women represent less than 50% of the qualified pool. Pet. at 7-9 & n.5. Further, their claim that it is difficult to identify the qualified pool (Opp. at 21-22) cannot justify a departure from Title VII cases because similar difficulties exist there. *See e.g., Hazelwood*, 433 U.S. at 309-11; *Wards Cove*, 490 U.S. at 649-50.

[13] Brown does not contend that "female athletes are not burdened by the denial of the opportunity to compete, so long as they have been able to prepare for competition." Opp. at 27-28. Brown contends that accomplished male and female athletes are equally burdened "by the denial of the opportunity to compete" at the collegiate level, and it would be unconstitutional to compel schools to afford those opportunities to qualified women in preference to similarly situated men in an effort to generate increased athletic interest among other disinterested women. *See e.g., Wygant v.*

Respondents do not dispute the fact that the interpretation adopted by the First Circuit in 1992 has posed compliance problems for almost every university in the nation and fueled a widespread reduction of opportunities for men. Opp. at 28-29. Instead, respondents suggest that these developments are of no consequence because the lower courts have not "required school[s] to cut men's sports teams," and a "school always has the option of simply increasing its women's program." Opp. at 28.

As the First Circuit recognized, however, "Title IX does not purport to override financial necessity," and many schools do not have the resources to pursue that option "[i]n an era where the practices of higher education must adjust to stunted revenues [and] careening costs" by "curb-[ing] spending on programs, like athletics, that do not lie at the epicenter of their institutional mission." Cohen II at 197a-98a. *See* also App. at 300a (OCR recognition that Title IX compliance presents a problem "in the face of increasing budget constraints.") In addition, the First Circuit cautioned universities choosing this path to compliance that "[s]taying on top of the problem is not sport for the short-winded" because "the institution must remain vigilant" by continually expanding its program for women "until the opportunities for, and levels of, competition are equivalent by gender." Cohen II at 183a. That is not a "simple" solution or an acceptable burden to place on universities such as Brown that are already providing equal opportunity to men and women alike, especially where that rule "would almost inexorably lead to the use of numerical quotas"—a result that "Congress and this Court have rejected repeatedly in the past." *Wards Cove*, 490 U.S. at 652. This court should grant certiorari.

Jackson Bd. of Educ., 476 U.S. 267, 274, 276 (1986) (plurality opinion) (invalidating minority preference designed to provide role models to redress effects of societal discrimination).

Respectfully submitted,

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